PEMUNGUT HASIL TANAH, DAERAH BARAT DAYA, PENANG

v.

KAM GIN PAIK & ORS.

PRIVY COUNCIL
LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD OLIVER
LORD GOFF
[APPEAL NO. 12 OF 1984]
12 FEBRUARY 1986

LAND LAW: *Acquisition by State Authority - Section 3 of the Land Acquisition Act 1960 - Sections 4, 6 - Notification in Gazette and compensation - Non-compliance with ss. 8, 9, 10 - Delay of 7 years between Gazette notification and award - Whether award invalidated - Intention of Parliament - Jurisdiction to quash order - Section 29(1)(b) of Government Proceedings Ordinance 1956.*

ADMINISTRATIVE LAW: *Certiorari - Quashing of award - Breach of rules of natural justice - Null and void.*

On the 30 March 1972, the Penang State Authority, under s. 8 of the Land Acquisition Act 1960 (hereinafter referred to as "the Act") published in the *Gazette* a declaration that certain lands including some in the ownership of the respondents (Kam Gin Paik & Ors.) were needed for "residential, industrial and public purposes, namely recreation, health, education, police station and public roads" (G.N. 89). Sections 9 and 10 of the Act provide for certain action to be taken by the Collector in relation to lands which are the subject of a s. 8 declaration. The respondent Kam Gin Paik on 31 December 1978, when action had still not been taken under s. 10 of the Act by the Collector commenced proceedings in the High Court *inter alia* for a declaration that the acquisition of respondent's lands was made *mala fide* (this appeal is in no way concerned with those proceedings).

The appellant held an inquiry under s. 10(1) of the Act from 8 December 1979 to 31 December 1979, as a result of which, on 7 February 1980, the appellant issued an award valuing the respondents' lands at RM172,066.05 plus a sum of RM21,700 in respect of certain buildings on the lands. The respondents' valuer valued their land at RM4,532,000 as at 7 January 1980 (refer judgment for procedure of valuation under the Act and proviso thereto).

On 16 October 1980, the respondents obtained leave of the High Court to apply for *certiorari* to quash the appellant's award and also an order staying the taking of possession of lands by the appellant. The respondents also later made application for *certiorari* in relation to alleged contravention of the rules of natural justice in the appellant's conduct of the inquiry leading to the award and also in relation to whether the delay between the publication of the s. 8 declaration and the holding of the inquiry had the effect of invalidating the award.

The learned trial Judge, Judicial Commissioner Mustapha Hussain made the following orders in the respondents's favour:

(a) an order quashing G.N. 89 and all subsequent proceedings including the inquiry and the award.

(b) an order declaring that any acquisition or taking possession by the appellant of the respondents' land was null and void and directing the Registrar of Land Titles to expunge from the titles to the land any entries to the contrary effect.

(c) an order directing the appellant to deliver back to the respondents possession of any of their lands which he had taken and

(d) finding the appellant liable to the respondents in costs.

Counsel for the appellant informed the Board that the order for a stay came too late as the appellant had already taken possession of some part of the respondents' land between February and October 1980. The appellant appealed to the Federal Court. The Court allowed the appeal in part and

(e) reversed the finding of the learned trial Judge that there had been contravention by the appellant in the course of the inquiry of the rules of natural justice.

(f) upheld the learned trial Judge's finding that the long delay between G.N. 89 and the inquiry invalidated the award

(g) held that the learned trial Judge did not have jurisdiction to quash G.N. 89 and therefore this part of the order was set aside.

(h) that under s. 29(1)(b) of the Government Proceedings Ordinance 1956 (the Ordinance), the trial Judge had no power to make order (c) above and set aside this part of the order.

The appellant then, with the leave of the Federal Court, appealed to His Majesty the Yang di-Pertuan Agong and the respondents, also with leave, appealed against orders (h) and (e) above. This appeal was therefore concerned with the validity of the award made by the appellant. The principal issue in this appeal was whether or not the Federal Court was correct in affirming the decision of the learned trial Judge that the long delay between G.N. 89 and the inquiry into compensation vitiated the appellant's award and rendered it null. If that issue is decided in the respondents' favour, it is unnecessary to deal with the cross-appeal in relation to the alleged breaches of the rules of natural justice.

Held:

[1] The principle to be applied in resolving this issue is well-settled per Upjohn LJ in *Simpsons Motor Sales (London) Ltd. v. Hendon Corporation* [1963] Ch 57 approved by Lord Evershed and unanimously concurred in at the House of Lords on appeal [1964] AC 1088. This principle is plainly and explicitly embodied in s. 10 of the Act and this was recognised by the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya Pulau Pinang v. Ong Gaik Kee* [1983] 2 MLJ 35 per Salleh Abas CJ. Section 10(1) has indicated in the clearest of manner, the intention of Parliament that the proceedings in s. 10 of the Act are to follow immediately upon the completion of the s. 9 procedure.

[2] The delay of 7 years between G.N. 89 and the appellant's notice of inquiry on 22 March 1979 had the effect that the latter was given in contravention of the statutory requirements and did not constitute a valid exercise of power. In addition, no attempt was made to justify or explain the delay.

[3] The appellant contended that failure of the landowner to object *ab ante* to an illegal proceeding had converted it into a legal one. This was rejected by their Lordships and their Lordships also held that the word "suit" in s. 68 of the Act did not include *certiorari.*

[4] The learned trial Judge and the Federal Court were correct in holding that the inquiry and subsequent award, were invalid and should be set aside.

[5] Hence the appellant was not entitled to take possession of the respondents' land under s. 18 of the Act and the appellant is therefore under a duty to restore possession to the respondents. However, the Privy Council agreed with the Federal Court on order (h) above. The Federal Court should however have gone on to make an order in terms of s. 29(1)(b) of the Ordinance declaring that the respondents were entitled as against the appellant to possession of the land.

[6] The Board upheld order (g) above of the Federal Court since G.N. 89 was entirely valid when made and nothing has happened since which can have the effect of invalidating it. The proceedings under s. 10 of the Act having been held invalid on the ground of delay, any future similar proceeding based on G.N. 89 would a *fortiori* be invalid. In the result, G.N. 89 has proved to be a *brutum fulmen.* The second part of order (b) of the learned trial Judge, which was not interfered with by the Federal Court, was upheld.

[7] The orders of the learned trial Judge and the Federal Court were varied by

(i) deleting from order (b) the words "such entries" and adding "all entries relating to the intended acquisition of the said land made in pursuance of G.N. 89 and all entries relating to acquisition of the said land by the State Authority made under s. 23 of the Act" and

(ii) Substituting order (c) with a declaration that the respondents are entitled, as against the State Authority, to the said lands and to the possession thereof.

[The appellant to pay respondents' costs of the appeal and cross-appeal.]

Cases referred to:
Simpsons Motor Sales (London) Ltd. v. Hendon Corporation [1963] Ch 57
Richmond v. North London Railway Co. [1868] LR. EQ 352
Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 2 MLJ 35
R. v. London County Council Ex parte Swan & Edgar [1927] Ltd. [1929] 141 LT 590
Hendon Corporation v. Simpsons Motor Sales (London) Ltd. [1964] AC 1088

Legislation referred to:
Land Acquisition Act 1960, ss. 3, 4, 5, 6, 8(1), (3), (2), 10(1), 18, 23, 38, 68
Government Proceedings Ordinance 1956, s. 29(1)(b)

For the appellant - Donald Rattee Q.C. (Peter Crampin with him)
For the respondents - Karpal Singh (Balwant Singh Purba with him)

JUDGMENT

Lord Keith of Kinkel:

This appeal and cross-appeal from the Federal Court of Malaysia are concerned with the validity of an award dated 7 February 1980 made by the Collector of Land Revenue, South West District, Penang, the appellant, purporting to assess compensation due in respect of the compulsory acquisition by the State Authority of certain lands owned by the respondents.

Section 3 of the Land Acquisition Act 1960, as amended, provides that the State Authority may acquire any land which is needed for *inter alia* any public purpose. Sections 4 to 6 provide for preliminary notification in the *Gazette* as to land likely to be needed for any of the purposes referred to in s. 3, for entry to and survey of such land, and for compensation

to be paid for any damage caused by such entry and survey. Section 7 provides for the submission to the State Authority by the Collector of Land Revenue of a plan showing the particular lands which it is necessary to acquire and a list of such lands.

Section 8(1) provides:

> (1) When the State Authority decides that any of the lands referred to in s. 7 are needed for any of the purposes referred to in s. 3, a declaration in Form D shall be published in the *Gazette.*

Under s. 8(3) a declaration in Form D is conclusive evidence that all the scheduled land referred to therein is needed for the purpose specified.

On 30 March 1972 there was published in the *Gazette* a s. 8 declaration (G.N.89) that certain lands, including some in the ownership of the respondents, were needed for "residential industrial and public purposes, namely recreation, health, education, police station and public roads".

Section 9 of the Act provides for certain action to be taken by the Collector in relation to lands which are the subject of a s. 8 declaration, including the marking out of the lands and the noting on the title to the lands of the intended acquisition. Section 10 provides:

> (1) The Collector shall, having completed the action required by s. 9, commence proceedings for the acquisition of the land by giving public notice in Form E in the manner prescribed by s. 52, and by fixing the date of an inquiry for the hearing of claims to compensation for all interests in such land.
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> (2) The Collector shall not hold such inquiry earlier than twenty-one days after the date of publication of the notice referred to in sub-section (1).
>
> (3) ...

On 31 December 1978, no action under s. 10 of the Act having yet been taken by the Collector, the respondent Kam Gin Paik commenced proceedings in the High Court seeking *inter alia*, a declaration that the acquisition of the respondent's lands was *mala fide*. This appeal is in no way concerned with those proceedings.

On 22 March 1979, the appellant gave notice of an inquiry under s. 10(1), which appears to have opened on the same day but to have been adjourned to 16 April 1979. It was further adjourned on the respondents' application, to 8 December 1979. The inquiry was actually commenced on that date and completed, after further adjournment, on 31 December 1979.

On 7 February 1980 the appellant issued an award, valuing the respondents' lands (including one lot from the acquisition of which the State Authority had, on 19 July 1979, withdrawn under s. 38 of the Act of 1960) at RM172,066.05, plus a sum of RM21,700 in respect of certain buildings on the land. In terms of paragraph 1 of the First Schedule to the Act of 1960, the market value of the land fell to be determined as at the date of the publication in the *Gazette* of the s. 4 notice in relation to the land, unless the s. 8 declaration was published more than 12 months later, in which event the date of publication in the *Gazette* of that declaration was to be the relevant date. It does not appear which of these two dates was the appropriate one in the present case, but it is evident the date of valuation can have been no later than 30 March 1972. The respondents' valuer valued their land at RM4,532,000 as at 7 January 1980.

On 16 October 1980 the respondents obtained leave of the High Court to apply for *certiorari* to quash the appellant's award, and also an order staying the taking of possession of the lands by the appellant. The respondents later made application for *certiorari* upon a number

of grounds, which in the end of the day came to be reduced to two issues, the first being concerned with alleged contraventions of the rules of natural justice in the appellant's conduct of the inquiry leading to the award, and the second with the question whether the delay between the publication of the s. 8 declaration and the holding of the inquiry had the effect of invalidating the award.

On 8 April 1983 Mustapha bin Hussain JC gave judgment in the respondents' favour on both these issues. He made an order (1) quashing G.N. 89 and all subsequent proceedings including the inquiry and the award, (2) declaring that any acquisition or taking possession by the appellant of the respondents' land was null and void and directing the Registrar of Land Titles to expunge from the titles to the land any entries to the contrary effect, (3) directing the appellant to deliver back to the respondents possession of any of their lands which he had taken, and (4) finding the appellant liable to the respondents in costs.

It is not clear from the record whether or not the appellant had in fact taken possession of any of the respondents' land. As narrated above, the respondents had on 16 October 1980, obtained an order staying the taking by the appellant of possession of any of their lands. The immediate effect of the award, under s. 18 of the Act of 1960, was to entitle the appellant to take possession of the land to which it related, and it may be that the order for a stay came too late as respects some part at least of the respondents' lands. Counsel for the appellant informed the Board that this was indeed the case, and that possession had been taken by his client some time between February and October 1980.

On appeal by the appellant the Federal Court (Abdul Hamid, Mohammed Azmi and Hashim Yeop A. Sani FJ) on 7 September 1983 delivered judgment allowing the appeal in part. The Court reversed the finding of the learned trial Judge that there had been contraventions by the appellant, in the course of the inquiry, of the rules of natural justice, but they upheld his finding that the long delay between G.N. 89 and the inquiry invalidated the award. On the other hand, they held that he had no jurisdiction to quash G.N. 89, and set aside that part of his order. They also held that having regard to s. 29(1)(b) of the Government Proceedings Ordinance 1956, the trial Judge had no power to make an order against the appellant for delivery up of possession of the respondents' lands, and accordingly set aside that part of his order. In other respects the Federal Court dismissed the appeal.

The appellant now appeals, with leave of the Federal Court, to His Majesty the Yang di-Pertuan Agong. The respondents, also with leave, cross-appeal against the setting aside by the Federal Court of the order for repossession, and also against the decision that there was no breach by the appellant at the inquiry of the rules of natural justice.

The principal issue in the appeal is whether or not the Federal Court were correct in affirming the decision of the learned trial judge that the long delay between G.N. 89 and the inquiry into compensation vitiated the appellant's award and rendered it null. If that issue is decided in the respondents' favour it is unnecessary to deal with the cross-appeal so far as concerned with alleged breaches of the rules of natural justice in the conduct of the inquiry.

The principle to be applied in resolving this issue is well settled. It was thus stated by Upjohn LJ, as he then was, delivering the judgement of the Court of Appeal in *Simpsons Motor Sales (London) Ltd. v. Hendon Corporation* [1963] Ch 57:

> ... when a notice to treat has been served, it is the duty of the acquiring authority to proceed to acquire the land within a reasonable time. Mr. Molony, for the corporation, has argued that mere delay in proceeding to enforce the notice can never disentitle the acquiring authority from proceeding thereunder, but that some additional circumstance is necessary before the owner

> can object to the enforcement of the notice to treat against him. We do not accept this proposition. If the acquiring authority do not proceed within a reasonable time to acquire the property and pay the compensation, they may well lose their rights to enforce the notice. It would be most unreasonable to permit an acquiring authority, having given a notice to treat, to sit on their rights and defer enforcement of the notice until it suits them. Lord Romilly M.R. pointed out how unfair it would be on the owner in *Richmond v. North London Railway Co.* [1868] L.R. EQ. 352, 358 nearly a century ago. How much more unfair it is today in an age of rapidly increasing land values! The underlying assumption of Parliament is that in conferring compulsory powers upon statutory authorities for public purposes, the acquiring authority will act reasonably in the public interest, that is, not only in the interests of their own ratepayers or shareholders, as the case may be, but with due regard to the interests of the person being dispossessed. What is a reasonable time for this purpose must depend upon the facts and circumstances of each case.

This statement of principle was approved in the speech of Lord Evershed, unanimously concurred in, when the case was before the House of Lords on appeal: [1964] AC 1088, 1117. Section 10 of the Land Acquisition Act 1960, which their Lordships have earlier quoted, plainly embodies this principle almost to the extent of making it explicit. By providing that the Collector "shall, having completed the action required by s. 9, commence proceedings" for an inquiry into claims for compensation, sub-section (1) has indicated in the clearest manner the intention of Parliament that these proceedings are to follow immediately upon the completion of the s. 9 procedure. This was recognised by the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 2 MLJ 35, where Salleh Abbas CJ (Malaya), delivering the judgment of the Court, said at p. 38:

> ... looking at the Act as a whole no one could deny that the proceedings under the Act are meant to be in a continuous motion so that no such interruption or such undue delay or stoppage as to amount to an abandonment of the acquisition could be regarded as within this motion. Under s. 38 of the Interpretation and General Clauses Ordinance, 1948 it is provided that:
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> > where no time is prescribed or allowed within which anything shall be done, such thing shall be done with **all convenient speed** and as often as the prescribed occasion arises. (Emphasis is Supplied).
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> What then is the 'convenient speed'? In our view it must be 'as soon as possible' or 'within a reasonable time', and not 'as late as possible'. Obviously what amounts to 'convenient speed' must vary from case to case and in our judgment seven years delay is certainly not a 'convenient speed' as it is so far outside the normal period of time that no reasonable authority could ever regard it as reasonable. That being the case the Court is entitled to strike down the impugned acquisition proceedings as illegal.

Their Lordships respectfully agree with this passage, subject to the observation that the reference to abandonment of the acquisition by the acquiring authority may be misleading. As was made clear in the *Simpsons Car Sales* case, (supra), the question whether the right to proceed with acquisition proceedings has been lost by delay is a separate question from that whether the acquisition has been abandoned. Delay contrary to the express or implied statutory requirements is in itself a ground invalidating proceedings which follow such delay, without the necessity of any inference that the acquisition has been abandoned.

Applying these principles, their lordships are of opinion that in this case the delay of 7 years between G.N. 89 and the appellant's notice of inquiry on 22 March 1979 had the effect that the latter was given in contravention of the statutory requirements and did not constitute a valid exercise of power. No attempt was made to justify or explain the delay. Counsel for the appellant could argue only that the respondents, not having taken any steps

to prevent the inquiry being held, but on the contrary having allowed it to proceed to the stage of an award, were not now entitled to have the proceedings set aside. It was sought to distinguish the *Pemungut Hasil Tanah* case, (supra), on the ground that there the landowner had objected, albeit ineffectually, to the holding of the inquiry. Their Lordships reject this argument. Failure to object *ab ante* to an illegal proceeding cannot convert it into a legal one. Reliance was also placed on s. 68 of the Act of 1960, which provides:

> No suit shall be brought to set aside an award or apportionment under this Act.

In the *Pemungut Hasil Tanah* case, (supra), it was held, on the authority of *R. v. London County Council Ex parte Swan & Edgar (1927) Ltd.* [1929] 141 LT 590, that the word "suit" in s. 68 did not include *certiorari*. Their Lordships agree and hold that upon that ground s. 68 is no answer in the present case.

It follows that the learned trial Judge and the Federal Court were correct in holding that the inquiry and subsequent award, upon the grounds which their Lordships have examined, were invalid and should be set aside. It is therefore unnecessary to consider the respondents' case upon alleged contraventions in the conduct of the inquiry of the rules of natural justice.

A valid award was a pre-requisite of the appellant's right to take possession of the respondents' lands under s. 18 of the Act of 1960. There having not been a valid award he was not entitled to do so and is therefore under a duty to restore possession to the respondents. However, their Lordships agree with the Federal Court that s. 29(1)(b) of the Government Proceedings Ordinance 1956 precludes an order being made against the Government whose servant the appellant is, for the recovery of the land. So the Federal Court rightly set aside that part of the order of the learned trial Judge which ordered the appellant to deliver possession of the lands back to the respondents. What the Federal Court should, however, have gone on to do was to make an order, in terms of s. 29(1)(b), declaring that the respondents were entitled as against the appellant to possession of the land.

The Federal Court also set aside that part of the order of the learned trial Judge which quashed G.N. 89 dated 30 March 1972. Here again, their Lordships consider that they were right to do so. G.N. 89 was entirely valid when made, and nothing has happened since which can have the effect of invalidating it. It is, however perfectly clear that no proceedings can now follow upon it which would have the result of bringing about a valid acquisition or possession of the land on the part of the appellant. The proceedings under s. 10 of the Act of 1960 which were commenced on 22 March 1979, having been held invalid on the ground of delay, any future similar proceeding based on G.N. 89 would a *fortiori* be invalid. In the result, G.N. 89 has proved to be a *brutum fulmen*. However, a note of the intended acquisition of the land has been made upon the register document of title to the land under s. 9(2) of the Act of 1960, and that clearly must have the effect of inhibiting any dealings with it. The order of the learned trial Judge required the Registrar of Titles to expunge from the register any entries such as would presumably have been made under s. 23 of the Act of 1960, indicating that the land had been acquired or taken into possession by the State Authority, and the Federal Court did not interfere with that part of the order.

So the final result should be that the appeal and cross-appeal are dismissed, but that the orders of Mustapha bin Hussain JC and of the Federal Court are varied to the effect, (1) of deleting from para. (b) of the former order the words "such entries" in the antepenultimate and penultimate lines and by adding at the end of the paragraph the words "all entries relating to the intended acquisition of the said land made in pursuance of G.N. 89 dated 30 March 1972 and all entries relating to acquisition of the said land by the State Authority made under

s. 23 of the Land Acquisition Act 1960", and (2) by substituting for para. (c) of the former order a declaration that the applicants are entitled, as against the State Authority, to the said lands and to the possession thereof.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong accordingly. The appellant must pay the respondents costs of the appeal and cross-appeal. The appeal has failed and although the cross-appeal has been formally dismissed it has not added to the costs of proceedings before the Board, the respondents having for all practical purposes secured complete success upon the merits of the case. The respondents claimed that the Federal Court should have awarded them the costs of the proceedings there, instead of making no award to either party, but their lordships are not disposed to interfere with the discretion of the Federal Court in that respect.

Also found at [1986] 1 CLJ 283